Supreme Court, U.S.
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No. 95-1941

In The

Supreme Court of the United States

October Term, 1995

WILLIS C. McALLISTER,

Petitioner,

v.

TELXON CORPORATION, LARRY COLLINS, AND DANA R. SIDES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ROBERT A. GOODMAN (0014279)
(Counsel of Record)
DANIEL D. DOMOZICK (0025040)
GOODMAN WEISS MILLER GOLDFARB
100 Erieview Plaza, 27th Floor
Cleveland, Ohio 44114-1824
Telephone (216) 696-3366
Telecopier (216) 363-5835

Counsel for Respondents Telxon Corporation, Larry Collins and Dana R. Sides

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Should a Petition for Writ of Certiorari be denied where the Petitioner's Due Process Clause arguments were not raised in or addressed by the District Court or the Court of Appeals, the Respondents are not state actors, the Petitioner was afforded traditional procedures, and the case was correctly decided on the basis of its facts, not on the basis of any important legal issues?

LIST OF INTERESTED PARTIES

The Petitioner is Willis C. McAllister.

The Respondents are Telxon Corporation, Larry Collins, and Dana R. Sides. Robert A. Goodman of Goodman Weiss Miller Goldfarb is Counsel of Record for all Respondents. Daniel D. Domozick of Goodman Weiss Miller Goldfarb is also Counsel for all Respondents.

Telxon Corporation has no parent company.

Telxon Corporation has one non-wholly owned subsidiary Telxon Corporation Systems Espana, S.A.

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents Telxon Corporation ("Telxon"), Larry Collins ("Collins"), and Dana R. Sides ("Sides"), respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Petitioner Willis C. McAllister seeking review of the decision of the United States Court of Appeals for the Fifth Circuit.

CONSTITUTIONAL PROVISIONS

Petitioner claims that the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution are implicated by this case.

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the Fourteenth Amendment provides:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall

> make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This petition stems from a complete defense verdict, following a trial in the United States District Court for the Southern District of Texas, Houston Division, in a race discrimination case. Petitioner, who is black, complained that he was discharged in September 1987 from his employment with Telxon because of his race, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.* Collins and Sides were Petitioner's supervisors at Telxon.

Petitioner filed suit in the United States District Court for the Southern District of Texas on June 29, 1988, alleging a violation of Title VII, a breach of "common law contract" and the commission of a "public policy tort." (Rec. Vol. 2, pp. 1-8). There were no allegations in the Complaint concerning any Due Process Clause violations.

The matter proceeded to a bench trial on February 25, 1992. After a four-day trial, the District Court found in favor of Respondents, holding that:

> The Court determines that, even if McAllister established a prima facie case, Telxon, Collins and Sides articulated legitimate, nondiscriminatory reasons for his discharge. The legitimate,

> nondiscriminatory reasons include unsatisfactory job performance, unprofessional behavior, and insubordination.

(App. A45).[1] Petitioner litigated his case as a Title VII action, not as a Due Process Clause violation action. (App. A27, A43-A46).

Petitioner then appealed the District Court's judgment to the United States Court of Appeals for the Fifth Circuit. On August 25, 1994, the Fifth Circuit unanimously affirmed in all respects the District Court's judgment. The Fifth Circuit held that:

> The district court made detailed findings of fact and conclusions of law, which plainly exonerate defendants for the Title VII violation of racial discrimination as to McAllister. . . . The district court's findings, which preclude any recovery by McAllister on any pleaded theory, are amply supported by the trial evidence, and McAllister has not demonstrated that they are clearly erroneous.

(App. A5-A6). Petitioner failed to argue to the Fifth Circuit that the Respondents or the District Court violated any Due Process Clause rights.

Petitioner then filed an apparently timely but defective Writ of Certiorari with this Court. The defective Writ was returned to Petitioner on or about December 29, 1994 where it sat until Petitioner re-filed his Writ of Certiorari on or about May 31, 1996.

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[1] All Appendix citations are to the Appendix in the Petition for Writ of Certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

Pursuant to Rule 10 of the Rules of the Supreme Court of the United States, a review of a Petition for a Writ of Certiorari is not a matter of right, but of judicial discretion. No special or important reasons exist in this case warranting the granting of the Writ of Certiorari, and Petitioner has identified none. First, Petitioner's entire Writ is premised on Due Process Clause violations, a theory he neither has pled nor argued below. Second, the Respondents are not state actors and thus are not subject to the Due Process Clause. Third, to the extent that Petitioner is arguing that the District Court, and not the Respondents, violated his Fifth and Fourteenth Amendment rights, this claim, too, is completely meritless. Petitioner was afforded traditional procedures and a substantively correct decision implicates no constitutional rights. Finally, Petitioner has not, and cannot, identify a conflict with any decision of a United States Court of Appeals or this Court on any of the issues adjudicated below. The District Court and the Fifth Circuit simply applied existing, established precedent to the facts of this case. Petitioner had his day in court. Therefore, this Court, in its discretion, should deny the Petitioner's Writ of Certiorari.

I.

THE PURPORTED DUE PROCESS CLAUSE VIOLATIONS ARE WITHOUT MERIT

From the "Questions Presented" through his "Conclusion," Petitioner argues that the Respondents and/or

the District Court violated his rights to Due Process under the Fifth and Fourteenth Amendments.

Petitioner conveniently does not mention that he neither pled nor argued this theory below. On this basis alone, Petitioner's failure to plead or argue a constitutional theory to the courts below is generally fatal to his claim. *Carlson v. Green*, 446 U.S. 14, 17, n.2 (1980); *Hormel v. Helvering*, 312 U.S. 552, 557 (1941).

Even had Petitioner argued that Respondents violated his Due Process rights (which he did not), it is well established that the Fifth and Fourteenth Amendments apply only to actions by the federal government and/or the state, not private parties. *Carpenter v. Scott*, 463 U.S. 825, 831 (1983) ("The Fourteenth Amendment protects the individual against state action, not against wrongs done by individuals. This has been the view of this Court from the beginning. It remains the Court's view today.") (citations omitted); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 644 (1991) (O'Connor dissenting) ("The Fifth Amendment's Due Process Clause prohibits only actions for which the Government can be held responsible."). Indeed, "[r]acial discrimination, although repugnant in all contexts, violates the constitution only where it is attributable to state action." *Georgia v. McCollum*, 505 U.S. 42, 50 (1992).

Nor has Petitioner ever claimed or demonstrated that Respondents and the state were in a symbiotic relationship, *see Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176 (1972), or that the state had encouraged or facilitated the alleged discrimination. *See Edmonson, supra*, 500 U.S. at 624.

To the extent that Petitioner is arguing that the District Court denied him Due Process, Petitioner's claim is meritless. The District Court afforded Petitioner traditional procedures. *See TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 470-471 (1993) (Scalia concurring). Moreover, substantively correct decisions implicate no constitutional rights. *TXO, supra*, 509 U.S. at 470-471. Petitioner's constitutional claims have no merit.

II.

NO IMPORTANT LEGAL ISSUE OR OTHER REASON JUSTIFIES GRANTING THE PETITION

Petitioner has not identified any conflict between the Fifth Circuit's decision here and any other decision by another Court of Appeals or this Court. Nor has there been any showing pursuant to Rule 10 that the Fifth Circuit "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power."

Petitioner's Title VII claim was the subject of a four-day trial. The District Court then produced lengthy, detailed Findings of Fact. The District Court utilized the standards set forth in established precedents of this Court, *McDonald Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), in determining that no Title VII violation occurred. In fact, the record is replete with instances of Petitioner's bizarre, unprofessional and hostile behavior that made his employment with Telxon simply unacceptable. (*See, e.g.*, 4th Supp. Rec. Vol. 5, p. 77 – Petitioner

stated that he had "hate, resentment and fear towards some whites," "irrational thoughts about hurting people, physically" and "phobias (at times) towards whites in offices"; 4th Supp. Rec. Vol. 5, pp. 71, 77, 87-89, 98-99 – Petitioner's wild accusations of murder plots and other criminal activity against Respondents).

In affirming the District Court's determination of Petitioner's Title VII claim, the Fifth Circuit likewise utilized established precedent in affirming the judgment in favor of Respondents. (App. A5-A6). Thus, the decisions by the District Court and the Fifth Circuit rest largely on the basis of the facts adduced at trial – which were clearly insufficient to establish a Title VII claim. A case that fails to prove a Title VII claim because of a paucity of facts presents no issue deserving of this Court's attention. *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949), *adhered to in part*, 339 U.S. 605 (1950) ("A court of law, such as this Court is, rather than a Court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error.").

Petitioner's other claims likewise deserve no attention from this Court. All of these other issues were correctly decided by the courts below.

As to Petitioner's claim that he was denied a jury trial of his Title VII claim, the Record is clear that Petitioner *never requested* a jury trial. (App. A7). The Record is also clear that Petitioner *never objected* to a bench trial. In any event, the jury trial provision in the Civil Rights Act of 1991, 42 U.S.C. § 1981a(a), does not apply to cases

arising before the statute's enactment. *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

Petitioner also claims that his motion for a continuance of trial and his counsel's motions to withdraw were improperly denied. Such motions are committed to the sound discretion of the District Court. *See Morris v. Slappy*, 461 U.S. 1, 11 (1983) ("broad discretion must be granted trial courts on matters of continuances"); *Washington v. Sherwin Real Estate, Inc.*, 694 F.2d 1081, 1087 (7th Cir. 1982) (a decision on motion to withdraw will be reversed on appeal only when the trial court has abused its discretion); *Huang v. The Bd. of Governors*, 902 F.2d 1134, 1142-1143 (4th Cir. 1990) (same). The District Court's orders here amply support this discretion in denying the motions. (App. A14-15, A17-81, A23-24). Likewise, the Fifth Circuit determined that "[n]either motion to withdraw presented grounds which compelled or required withdrawal, and under the circumstances, no abuse of discretion by the district court is demonstrated as to the motions to withdraw and the motion for continuance." (App. A9). Moreover, Petitioner presents no argument or case law citation demonstrating any error below.

Finally, Petitioner's claims that Requests for Admissions wrongfully were deemed admitted against him is erroneous. On the first day of trial, and prior to opening argument, the District Court properly deemed admitted Telxon's Requests for Admissions directed to Petitioner. (4th Supp. Rec. Vol. 3, pp. 3-9).

Even if the District Court erred in admitting the Requests for Admissions, such error was certainly harmless. The District Court could have granted, but chose not

to, Respondents' Summary Judgment Motion on the basis of the Requests for Admissions alone. Instead, the District Court held a lengthy four-day trial in which Petitioner was provided his day in court. Moreover, the District Court's Findings of Fact and Conclusions of Law do not mention or rely upon any of the admissions in this matter. There was ample evidence in the record from which the District Court and the Fifth Circuit determined that no discrimination of any kind whatsoever was directed at Petitioner. (App. A10).

CONCLUSION

The Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT A. GOODMAN (0014279)
(Counsel of Record)
DANIEL D. DOMOZICK (0025040)
GOODMAN WEISS MILLER GOLDFARB
100 Erieview Plaza, 27th Floor
Cleveland, Ohio 44114-1824
Telephone (216) 696-3366
Telecopier (216) 363-5835

Counsel for Respondents Telxon Corporation, Larry Collins and Dana R. Sides